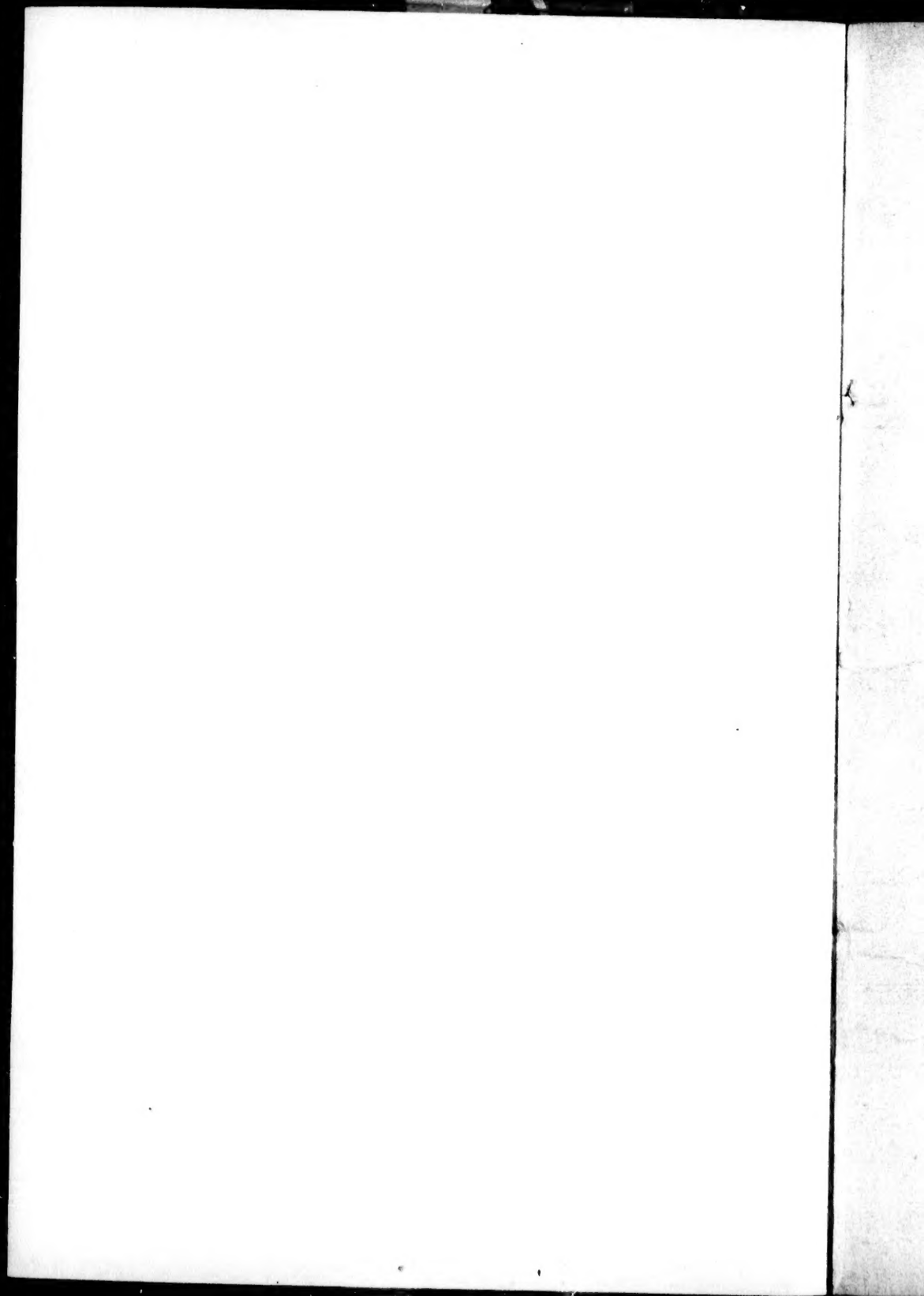




OBSERVATIONS
ON THE
Supreme Appellate Jurisdiction
OF
GREAT BRITAIN
AS IT IS NOW EXERCISED BY THE COURTS OF
THE QUEEN IN COUNCIL
AND
THE HOUSE OF LORDS.

—◆—
BY
WILLIAM BURGE,
OF THE INNER TEMPLE, ONE OF HER MAJESTY'S COUNSEL.

—◆—
"Ubi exercentur judicia ut oportet, ibi ordo civitatis conservatur, et quasi
"anima. Conservatur institutio, vindicantur leges. Tota quippe juris vis dependet
"a judiciis."—*D. Heinsius, Paraph. Aristot.* 1. Pol. 2.

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TO
THE RIGHT HONOURABLE
LORD COTTENHAM,
LORD HIGH CHANCELLOR,
&c. &c. &c.

MY LORD,

These observations on the present state of the ultimate Appellate Jurisdiction of this country are respectfully submitted to your Lordship. I hope I am not mistaken in believing that it has been in my power, as it certainly has been my intention in exposing the defects of this part of our judicial system, to avoid any expression which could be considered inconsistent with the high respect and esteem which I entertain for those by whom it is administered. In suggesting the means by which those defects might be remedied, I have adopted principles, many of which have received the sanction of your Lordship, others have been recommended by Lord Langdale, and other eminent and learned persons whose attention has been directed to this important subject.

Participating in the confidence with which the Public and the Profession, regardless of all party and political differences, acknowledge your high judicial endowments, and your solicitude to promote the efficient administration of justice, I am persuaded these observations will receive from your Lordship whatever degree of consideration they may be found to merit. They have originated in the desire that the ultimate Appellate Jurisdiction of this great Empire should be rendered adequate to the purposes for which it exists, and in its exercise should enjoy that high character for efficiency, weight, and authority which so greatly distinguished similar institutions in Europe, whose decisions were, and continue to be the best expositions of the jurisprudence they administer, and afford the wisest and safest guides to the continental Jurists of the present age.

I have the honour to be,

My Lord,

With great respect,

Your Lordship's most obedient

Humble Servant,

WILLIAM BURGE.

1, *Paper Buildings, Temple,*
23rd January, 1841.

OBSERVATIONS,

§c. §c.

THE judicial power is the most important branch of the Supreme authority of a State. It alone enables the subject to derive any benefit from the exercise of the legislative power, however perfect may be its constitution, and however equitable and beneficial may be its acts. It alone protects him from any abuse of the executive power. On the manner, therefore, in which the judicial power is exercised, and consequently on the formation and character of the institutions to which it is committed, depend the civil liberty of the subject, and the attainment of the great ends of civil society.

Those institutions would be inadequate to the purposes for which they were established, if there did not exist some supreme authority which, without violating the necessary independence of the judicial power, might be invoked to correct any abuse in its exercise, and thus secure the constant, faithful, and uniform application and execution of the laws. That authority is supplied by the tribunal of

ultimate appeal, which forms an essential part of every judicial institution. In its origin the appellate jurisdiction was and has continued to be exercised in the name of the Sovereign power. The suitor preferred his complaint to the Sovereign when he considered himself aggrieved by the decision of the judge. As legislation advanced, and the subjects of judicial controversy were rendered by the progress of civilisation more numerous and intricate, the investigation of the complaint was referred to some select body, composed of those who were conversant with the law. In the origin and earlier exercise of their appellate jurisdiction, there is a striking similarity in the judicial institutions of all the different states of Europe.* But in its further progress that similarity ceased. In every state in Europe, except Great Britain, whatever has been done in relation to the Courts of Appellate Judicature has been intended to render them more adequate to accomplish the purpose which required and rendered their establishment indispensable. They became and continued objects of primary importance. They were the only authoritative interpreters of the law. It is a striking proof of their weight and authority, that with very few exceptions the only reported decisions of the conti-

* Sir M. Hale's Treat. on the House of Lords, p. 155. Meyer's *Esprit*, &c. *Des Institutions Judiciaires*, tom. 5. Hertius de *Jud. Rev. Diss.* and de *Consult.* &c. *Diss.* Boehm. *Introd. Jus. Pub.* lib. 2, c 7.

mental Courts are those of their Supreme Courts of Appeal. Those reports still retain their high character, and are the best depositories of the jurisprudence of Europe.*

It is a singular feature in the judicial system of Great Britain, that her superior Courts of ultimate appeal do not, either in their constitution, or their means of efficiency, command the same degree of confidence which is enjoyed by her superior Courts of original jurisdiction.

The two tribunals of ultimate appeal in Great Britain are, in the language of the law and constitution of this country, the House of Lords, and the Queen in Council.

The subjects of the appellate jurisdiction of the House of Lords are, appeals from decrees and orders in the Courts of Chancery and Exchequer, as Courts of Equity, and from all other Courts of Equity in England, writs of error from the Queen's Bench and Exchequer Chamber, appeals from the decrees of the Court of Chancery, and writs of error from the Exchequer Chamber in Ireland; and from the decisions of the Court of Session in Scot-

* See the list of the eminent Reporters of the decisions of the principal Appellate Courts of Europe in the Preface to the Reports of Mævius, to which may be added the Reports of Christinæus, Carpzovius, Stockmans, Wynant, Neostad, the Journal des Principales Audiences du Parlement, by Du Fresne, François Jamet de la Guessiere, and Nupied, and the Discursus Legales of Casaregis, &c. &c. &c. See also Hertius Diss. *supra*.

land. But, although this jurisdiction is exercised, and the decisions of the Court are given in the name of the House of Lords, yet in reality those decisions are made by the Lord Chancellor, assisted, when he pleases, by other Judges. But it is not essential to the constitutional exercise of this jurisdiction, that he should call for or receive that assistance. It is sufficient that there are three peers present during the hearing of the appeal, and when the House adopts the decision of the Lord Chancellor.

The Court of Appeal of the Queen in Council is the tribunal which reviews the decisions of the Courts of those numerous colonies and dependencies in every part of the globe, which have so extended the British Empire, that it may now be said of its Sovereign, as was said of old of the Kings of Spain, that the sun never sets on her dominions. It is the Court of ultimate appeal from the decisions of the High Court of Admiralty in England, and of the Vice-Admiralty Courts in the Colonies. It possesses also the appellate jurisdiction, which was formerly exercised by the High Court of Delegates. Although the affirmance or reversal of the sentence appealed from is in the name, and is declared to be the act of the Sovereign, founded on the recommendation of the Privy Council, yet in fact the appeal itself is heard before, and the recommendation of affirmance or reversal decided on by a small number of the Privy Council, usually

not more than four. Indeed, according to the practice which had prevailed for many years, until the Act was passed appointing the Judicial Committee, the only Judge who attended the hearing, and decided on the recommendation, was the Master of the Rolls, although there were occasions when other Judges assisted, but these were rare exceptions to the general practice.

It forms a very striking anomaly in the history of the judicial system of this country, that these two Courts of appellate jurisdiction have not been the objects, nor have they participated in any of those measures which have been adopted for rendering the superior Courts of original jurisdiction better adapted to the altered state of the country, and more competent to satisfy those demands on their functions which the extent of its commerce and the increase of its population and wealth had necessarily created.

Of the extent to which the business of the Court of Chancery had increased, some idea may be formed from the fact, that the amount of the funds standing in the name of the Accountant-General in 1750, was 1,665,160*l.* 18*s.* 4*d.*, but that it now exceeds forty-one millions. This was personal property alone, and the subject of litigation in the Court of Chancery. The value of the real property litigated in that Court is, perhaps, of still greater amount.*

* See Mr. Pemberton's speech in the House of Commons, on the 5th August, 1840, p. 10.

But this fact not merely establishes the increase of business in the Court of Equity, but it affords the means of estimating the extent of the personal and real property which would be the subject of litigation in the Courts of Law in England, the Courts of Law and Equity in Ireland, and the Court of Session in Scotland. The increase in the business of the Courts of original jurisdiction necessarily involves an increase in the business of the House of Lords, which, as a tribunal of ultimate appeal, has to adjudicate on the decisions of those Courts.

The Courts of Common Law have been rendered more adequate to meet the increased demands on their functions, partly by deviations from their original constitution, or by modifications and alterations in their practice and forms of proceeding, and by an increase to their judicial power in the appointment of additional Judges.

Some progress has been made towards the adoption of similar measures for facilitating the administration of justice in the Courts of Equity. The necessity of a considerable increase in its judicial strength is so universally admitted, that one branch of the Legislature passed in the last Session of Parliament, a bill for the appointment of two additional Equity Judges, and the failure of the bill in the House of Commons is not attributable to any doubt of the necessity of such appointment.

The necessity which required that means should be taken in order to facilitate and render more

effectual the administration of justice in the Courts of original jurisdiction, implied that a necessity at least equal in degree existed for adopting measures which might facilitate the administration of justice by that superior appellate tribunal which heard and adjudicated as the dernier resort on the decisions of those Courts. Indeed, if those measures are successful in preventing delay, and in promoting the dispatch of the business of the Courts of original jurisdiction, they would cause the necessity to be still more urgent for enabling the Court of ultimate appeal to dispose of the additional number of causes which would thus be brought before it.

These and other considerations apply with still greater force to the appellate jurisdiction exercised by the Queen in Council in deciding on Appeals from the Colonies and dependencies of Great Britain. Until the year 1833, no attempt was made to alter the constitution of that Court, or render it in any degree equal to that increased demand on its powers, which was necessarily caused by the greatly multiplied subjects of litigation, and by the various systems of jurisprudence, with which that Court must make itself acquainted to enable it adequately to discharge its appellate functions.

The appeal to the Queen in Council, like that to the House of Lords, as a Court of Judicature, had its origin in the principle that the King was the fountain of justice, and the authority to be resorted to in any case of grievance by error, delay, or ob-

struction in the ordinary Courts. The Parliament was the tribunal to which the redress of the grievance was transferred by the King, when it was committed in the Courts of the Realm, but when it was committed by the Courts of a dependency of the Crown, the Sovereign considered the Parliament not entitled to interfere. Those dependencies were in fact regarded by the Sovereign as parcel, not of the Realm, but of the Crown. This consideration, and the right always exercised by the subjects of Normandy of appealing to the Duke of Normandy in person, led to the appeals from the Courts of Guernsey and Jersey being addressed to the King in Council, and referred by his authority to a Committee of his Council.

This doctrine respecting the relation of the Colonies to the Crown, and their independence of the Parliament, and which the North American Colonies themselves maintained, and which was not abandoned by the Crown until the Revolution, and the precedent which the appeals from Guernsey and Jersey afforded, led to the practice of appealing to the King in Council from the Superior Courts in the Colonies of North America and the West Indies.

For a long period of time, the occasions must have been very few, when the Privy Council would be required to exercise its appellate jurisdiction in deciding appeals from Guernsey and Jersey, or from the Plantations and Colonies in America and the West Indies.

The dependencies of Guernsey, and Jersey were too inconsiderable in wealth and population, to afford many subjects for appeal. Considerable progress must be made in the settlement of a new colony before its inhabitants are either disposed or able to prosecute appeals. At a very early period too a restriction was imposed on the exercise of the right of appeal to the King in Council, which must have operated as a prohibition. Leave to appeal must have been obtained from the supreme Court in the Colony, and that leave was not to be granted, unless the sum in dispute exceeded 500*l.* sterling.

It is quite evident from these causes, from the tendency of some of the doctrines current in the earlier settled North American Colonies, and from the comparatively inconsiderable number of the British colonies, and possessions, that the appellate business continued for a long period, much too inconsiderable to excite attention, either to the constitution of the Court, or to the manner in which it disposed of appeals.

It appears, from the few instances in which any of the earlier Reports refer to its judicial proceedings, that the Privy Council was assisted by one or more of the principal Judges of the superior Courts of Law and Equity. In 1717, on the decision of the appeal, in which was raised the question, whether the inhabitants of the Isle of Man had a right of appeal to His Majesty in Council, the Court was assisted by Chief Justice

Parker.* A few years afterwards, in 1726, on a question respecting the time within which the appeal papers from the Colony should be transmitted, in order to prevent the dismissal of an appeal, the Privy Council was assisted by the Lord Privy Seal, Lord Trevor, Chief Justice Raymond, the Master of the Rolls, and Lord Chief Justice Eyre.† In 1739, 1747, and 1762, Lord Chief Justice Lee, and Lord Mansfield, are found assisting in the hearing of appeals from the Colonies.‡

It is to be observed also, that with the exception of the Law of Normandy in the Channel Islands, and the Manks law of the Isle of Man, the appeals from the Colonies in North America, and the West Indies involved no system of foreign jurisprudence. The Common, and Statute Law of England, and the doctrine of the English Courts of Equity were administered in those Colonies, unless there had been any deviation therefrom specifically made by Acts of their Local Legislatures.

At the peace of 1763, not only had her old Colonies greatly advanced in wealth and population, but Great Britain acquired a considerable increase of Colonial possessions. At the same time the rapid increase of the commerce, population, and wealth of Great Britain, furnished so great an accession to the business of the Courts of Law, that

* 1 P. Wms. 330.

† 2 Ld. Raym. 1448.

‡ 2 Ambler, 414.

it was a serious interruption to it, if their Judges were withdrawn to assist in the decision of appeals at the Privy Council.

The Master of the Rolls was, until within the last few years, much less occupied than any other Judge. His sittings were in the evening, except for short periods in a few mornings after each term. His assistance, therefore, at the Privy Council could be, and was obtained with less injury to the suitors of his Court, and he became the constant, and, except on some few occasions, the only Judge by whom appeals were decided.

The number of Colonial possessions and dependencies of Great Britain continued to be augmented. The Appellate business was, therefore, not only increased, but many of those possessions adopted a system of law different from that of the parent state. The decision of appeals from the Courts of the latter, required an intimate acquaintance with various systems of foreign jurisprudence, as well as with the Law of England.

Hence it became essential, not only that its sittings should be regular and frequent, but that its Judges should be acquainted with those systems of jurisprudence which they were to administer. If ever the qualification of an individual could afford an excuse for the delegation of so momentous a trust as the Appellate Judicature of the Privy Council to a single Judge, the extraordinary and peculiar attainments of Sir William Grant, who

assisted so many years in the decision of appeals, would have furnished that excuse. His early education and professional practice rendered him more familiar than any other Judge who preceded or followed him, with the Civil Law, and with those systems of jurisprudence which were in so great a degree founded on its principles. But the qualifications with which it may happen the Judge is endowed, do not affect the constitution or principles of the Court, although, so long as that Judge remains, these qualifications may mitigate some of its evils.

Sir William Grant's successors, who, as Masters of the Rolls, heard appeals at the Privy Council, did not bring to that tribunal the qualities which so eminently distinguished him, and which would, if it had been possible, have reconciled the public to the constitution of this Court.

A Court of Appeal, which might have been adequately qualified to hear appeals from the dependencies of Great Britain, when those dependencies consisted only of the Islands of Guernsey and Jersey, became wholly unsuited when they had been so augmented in number and extent over every quarter of the globe.

It may be well to pause here, and take a view of the immense jurisdiction of the Privy Council, as a Court of Appeal, the numerous colonies and dependencies which are subjected to it, and the extent of the population, whose rights of person and

property, and whose legal and political rights are affected by the manner in which it is exercised. The Anglo-Indian empire contains 100,000,000 of people, subjects to the British Crown. That is,

	Inhabitants.
The Presidency of Bengal contains .	40,000,000
„ Agra „ .	38,000,000
„ Madras „ .	15,000,000
„ Bombay „ .	7,000,000
Total	100,000,000

In Asia, there is Ceylon, with a population of 1,000,000 ; and an area 24,644 square miles=11,771,160 acres.

In the West Indies, are the colonies of Jamaica, Trinidad, Tobago, Grenada, St. Vincent, Barbadoes, St. Lucia, Dominica, Antigua, Montserrat, Nevis, St. Kitts, Anguilla, Tortola, and the Virgin Isles, New Providence, and the Bahama Islands, St. George's and the Bermuda Isles ; the population of these possessions exceeds 1,000,000 ; they present an area 13,000 square miles=7,720,000 acres.

In North America, there are the Colonies of Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward's Island, Cape Breton, and Newfoundland ; with a population of one million and a half of white colonists ; area 435,000 square miles, or 279,400,000 acres ; and independent of the foregoing, Hudson Bay territories extend over 370,000 square miles.

In South America, are the colonies of Demerara, Essequibo, Berbice, Honduras, and the Falkland Isles. Their population exceeds 120,000 ; there is an area of 165,000 square miles=105,600,000 acres.

In Africa, there are the colonies of the Cape of Good Hope, Mauritius, Mahé, and the Seychelles Islands, St. Helena, Ascension, Sierra Leone, the Gambia, Accra, Cape Coast, &c. ; with a

population of more than 350,000 ; area 250,000 square miles=160,000,000 acres,

In Australasia, are the settlements of New South Wales, Van Dieman's land, Swan River, King George's Sound, South Australia, Norfolk Island, &c. ; with a population, 120,000 ; area 500,000 square miles=320,000,000 acres.

In Europe, are the dependencies of Gibraltar, Malta, Gozo, Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Paxo, Cerigo, &c. ; with a population of 400,000 ; area 1,500 square miles=1,000,000 acres. (a)

In contrasting the momentous and arduous duties, which it is obvious from this summary, devolve on the Privy Council as the court of last resort, with the actual constitution of that Court, and with its means of adequately discharging those duties, it is impossible to forget the following description given of it by Lord Brougham in 1828. That eminent person was peculiarly qualified, not only from his considerable practice at the bar of that Court, but from his extensive and general acquaintance with other systems of jurisprudence, to describe what the Court of Privy Council was, and what ought to be the constitution of the Court which had to discharge its duties. " All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of such a vast and varied province, is exercised by the Privy Council un-

(a) See Montgomery Martin's *Statistics of the British Colonies*,—a work of very great merit.

aided and alone. It is obvious that, from the mere distance of those Colonies, and the immense variety of matters arising in them, foreign to our habits, and beyond the scope of our knowledge, any judicial tribunal in this country must, of necessity, be an extremely inadequate Court of Review. But what adds incredibly to the difficulty is, that hardly any two of the Colonies can be named which have the same law, and in the greater number the law is wholly unlike our own. All those laws must come, in their turns, in review, before the necessarily ignorant Privy Councillor, after the learned doctors in each have differed. The difficulty thus arising, of necessity from our distance, an unavoidable incident to our Colonial empire, may almost be deemed an incapacity, for it involves both ignorance of the law, and unfitness to judge of the facts. But so much the more anxious should we be to remove every unnecessary obstacle to right judgment, and to use all the correctives in our power. The judges should be men of the largest legal and general information, accustomed to study other systems of law besides our own, and associated with lawyers who have practised or presided in the Colonial Courts. They should be assisted by a bar limiting its practice, for the most part, to this Appeal Court ; at any rate making it their principal object. To counteract, in some degree, the delays necessarily arising from the distance of the Courts below, and give ample time for patient

inquiry into so dark and difficult matters, the Court of Review should sit frequently and regularly at all seasons. Because all these precautions would still leave much to wish for, that is no kind of reason why you should not anxiously adopt them. On the contrary, it is your bounden duty, among those countless millions whom you desire to govern all over the globe, not to suffer a single unnecessary addition to the inevitable impediments which the remote position of the seat of empire throws in the way of correct and speedy justice. Widely different are our arrangements. The Privy Council, which ought to be held more regularly than any other Court, sits far less constantly than any, having neither a regular bench, nor a regular bar. It only meets on certain extraordinary days—the 30th of January, the Feast of the Purification, some day in May, Midsummer day, and a few others. I find that on an average of twelve years, ending 1826, it sat in each year nine days, to dispose of all the appeals from all the British subjects in India; from our own civil Courts, to the jurisdiction of which all our subjects are locally amenable throughout the wide extent of the several Presidencies; to dispose of all the causes which come up to the three several native Courts of last resort, the Sudder Adawluts, from the inferior Courts of Zilla and Circuit, comprising all contested suits between the Hindoos, the half-caste people, and the Mahomedan

inhabitants. But in the same nine days are to be disposed of all the appeals from Ceylon, the Mauritius, the Cape, and New Holland ; from our Colonies in the West Indies and in North America ; from our settlements in the Mediterranean, and from the Islands in the Channel ;—nine days' sittings are deemed sufficient for the decision of the whole. You are not to suppose that the business of these nine days upon which they sit is all transacted before lawyers ; one lawyer there may be, but the rest are laymen. Certainly a right honourable gentleman whom I see opposite to me, is there sometimes by chance, and his presence is sure to be attended with great advantage to us. Occasionally we see him, or my learned friend, his predecessor, (Mr. Abercromby), but this good fortune is rare ; the Master of the Rolls alone is always to be seen there, of the lawyers. For the rest, one meets sometimes in company with him, an elderly and most respectable gentleman, who has formerly been an ambassador, and was a governor with much credit to himself in difficult times ; and now and then a junior Lord of the Admiralty, who has been neither ambassador nor lawyer, but would be exceedingly fit for both functions, only that he happened to be educated for neither. And such, Sir, is the constitution of that awful Privy Council which sits at Westminster, making up for its distance from the suitors, by the regularity of its sitting ; and for its ignorance of local laws and

usages, by the extent and variety of its general law learning : this is the Court which determines, without appeal, and in a manner the most summary that can be conceived in this country, all those most important matters which come before it. For instance, I once saw property worth 30,000*l.* sterling per annum, disposed of in a few minutes after the arguments at the bar ended, by the learned members of the Privy Council, who reversed a sentence pronounced by all the judges in the settlement, upon no less than nineteen days' most anxious discussion. Such a Court, whose decisions are without appeal,—irreversible, unless by Act of Parliament,—is the supreme tribunal which dispenses the law to eighty millions of people, and disposes of all their property.”*

Of the extent to which the systems of jurisprudence prevailing in these possessions differ from the law of England, and from each other, and the extent, therefore, of that learning which has to be understood and applied by the Appellate Court, in order that it may adequately discharge its duties, some impression may be formed from the following summary.

In our Anglo-Indian empire, in addition to the English jurisprudence in the Presidencies, there is the Mahommedan law in one territory ; in another,

* Mr. Brougham's Speech on the State of the Law, 7th February, 1828.

the Native or Hindoo law, and in some of our possessions the law of Buddha qualifies or supersedes the latter.

The appeals from the Mauritius must be decided according to the Code Civil of France, and those various modifications of it introduced by the French Government before, and by British Orders in Council since it became a dependency of Great Britain. Appeals from Ceylon, the Cape of Good Hope, Demerara, and Berbice, must be decided by the Roman-Dutch law which prevails in those Colonies. Appeals from St. Lucia, and Lower Canada, by the Coutume of Paris, and by Orders of Council in the former, and Acts of the Provincial Legislature in the other of these possessions. The decision of appeals from Trinidad must be made with relation to the law of Spain, and Orders in Council. Again, the dependencies of Great Britain possessed in Europe, namely, Malta, Corfu, &c., adopt a system of jurisprudence different from that which prevails in any other of the British possessions.

It appears from the return made to the House of Commons, on the 8th of August, 1840, No. 615, that exclusively of East India appeals, there were pending on the 15th of February, 1837, one hundred and sixty-five appeals from the different Colonial possessions of Great Britain, and of those one hundred and sixty-five, no less than one hundred and fifteen were appeals from Colonial Courts, in which English jurisprudence did not prevail, and conse-

quently, those one hundred and fifteen appeals had to be decided according to the Coutume of Paris, the Code Civil, the Roman-Dutch Law, or the Law of Trinidad; and in the appeals lodged since that period, more than one-half involved the application of one or the other of those systems of foreign jurisprudence.

In those Colonies and Settlements in the West Indies, North America, Africa, and Europe, which have not been already noticed, and in Australia, systems of jurisprudence prevail, in which municipal laws have been engrafted on, or have totally deviated from, or partially modified and altered parts of the common and statute law of England.

In estimating the qualifications which are required for this Court of Appeal, it ought to be borne in mind, that the judicatories, whose judgments are submitted to its revision, are so constituted, that in many instances they do not, and cannot enjoy the confidence of the public. The competence of the Appellate Court to review and correct them, is the only security which the inhabitants of the Colonies possess that justice will be rendered to them. In all the Colonies except one, where Courts of Equity are established, the Governor is the sole judge in equity. In the greater number of the West India Colonies, in which the common and statute law of England, and the acts of the local Legislatures constitute their jurisprudence, one only of the three or four

judges necessary to constitute a Court of Law has been educated for the profession.

The Courts of Error through which the judgments of the Courts of Common Law must be carried, before they can be brought before her Majesty in Council by appeal, are composed entirely of persons who have never received any legal education.

In those Colonies which adopt either the French, Spanish, or Roman-Dutch law, the judges of those Courts will be found to have been taken from the English or Irish Bar, and who previous to their appointment, had acquired no acquaintance with the law or practice of the Courts of which they were to be the judges.

Sir John Leach, one of Sir William Grant's successors as Master of the Rolls, deciding Plantation Appeals at the Privy Council, afforded some striking proofs of his sense of the inadequacy of that Court to deal with those questions of foreign law which were presented to it, and the correct knowledge and application of which could alone enable the Court to pronounce, whether the judgment appealed from was erroneous. On the 9th of June, 1827, an appeal from a sentence of the Court of Civil and Criminal Justice in Demerara, (Freyhaus, executor of Henschelius v. The Heirs of Forbes) was heard at the Privy Council. The legality of the sentence depended on the law of Holland, as administered in Demerara. The Court

professing itself incompetent to pronounce what that law was, made an order that the printed cases of both Appellant and Respondent should be sent to Dr. C. M. Van Hall, at Amsterdam, for his opinion on these two questions. First, whether, after the decree of *perpetuum silentium*, it was competent to the Respondent, by the law of Holland, as administered at Demerara, and under the special circumstances of the case, and particularly the letter of the 27th of May, 1817, (one of the proofs in the cause) to institute the proceedings in which the sentence appealed against was pronounced: secondly, whether, under the circumstances appearing from the accompanying papers (the proofs) and particularly from the Appellant's letter of the 27th of May, 1817, the Court was justified, by the law of Holland as administered at Demerara, in pronouncing the sentence appealed against.

Dr. Van Hall having given in his opinion an answer in the negative to both these questions, the Privy Council, after hearing this opinion, on the 30th of January 1828, dismissed the appeal, with 150*l.* costs.*

It will be seen that in this instance Dr. Van Hall and not the Supreme Appellate Tribunal, decided the case.

In the same year, a question which ought to

* 1 Knapp's Appeal Cases, 118, 119.

have been decided by that Court, was referred to two French advocates in Paris, and their opinion constituted its decision.*

So deeply was that learned judge impressed with the opinion that the decisions of the Privy Council could not be considered as a correct exposition of the foreign law, that upon this ground, and this ground alone, he refused to sanction the publication by Mr. Knapp of his Reports. Notwithstanding that refusal, Mr. Knapp persevered with the publication of his Reports, and which was so completed as to merit and obtain great credit with the profession. Sir J. Leach at first would not allow them to be cited, and subsequently, when they were read by counsel, he expressed in open Court his objection, not because they were in any respect inaccurate, but because the decisions containing expositions of foreign law with which the Court was unacquainted, could never be deemed of sufficient authority to justify their publication

The noble and learned lord, who in 1828, felt, and so powerfully described the evil of the constitution of the Privy Council as a Court of ultimate appeal, introduced in 1833 a measure which was intended to remedy that evil.

By the Judicial Committee Act, the President of the Council, the Lord Chancellor, the Lord Chief Justices of the King's Bench and Common

* *Quelin v. Moisson*, 1 Knapp's Rep. 266.

Pleas, and the Lord Chief Baron of the Exchequer, the Master of the Rolls, the Vice Chancellor, the judge of the Prerogative Court of the lord archbishop of Canterbury, judge of the High Court of Admiralty, and chief judge of the Court in Bankruptcy, and also all persons members of his Majesty's Privy Council, who had been president thereof, or had held the office of Lord Chancellor of Great Britain, or any of the other offices thereinbefore mentioned, were constituted a Committee of his Majesty's said Privy Council, and styled "The Judicial Committee of the Privy Council." Power was reserved to his Majesty, from time to time, by his sign manual, to appoint any two other persons, being Privy Councillors, to be members of the said Committee. The Act directed, that no matter should be heard, nor should any order, report, or recommendation be made by the Judicial Committee, in pursuance of the Act, unless in the presence of at least four members of the said Committee: and that no report or recommendation should be made to his Majesty, unless a majority of the members of such Judicial Committee, present at the hearing, should concur in such report or recommendation. His Majesty was empowered, if he should think fit, to summon any other of the members of his said Majesty's Privy Council, to attend the meetings of the said Committee.* The Act

* 3 & 4 Wm. 4, c. 41.

transferred to the Committee all appeals from Prize Courts, from the Courts of Vice Admiralty in the Colonies, and all those appeals which theretofore had been decided by the Delegates. A great addition was thus made, to the appellate business belonging to the Privy Council; and it was further augmented by being made the tribunal for entertaining and determining applications for the prolongation of the terms for Patents.

It is not necessary to examine or express any opinion on the other provisions of the Act, or the power which it conferred on the Court to receive new evidence or direct the trial of issues.

The inquiry is, whether this measure has rendered the Court of Appeal, both in the manner of its constitution, and the frequency and regularity of its sittings, such as the noble and learned author of that measure considered in his speech in 1828 it ought to be? To that inquiry, after seven years' experience of its working, the answer was given last session, in the House of Commons, by her Majesty's leading Minister in that House. "I think," says Lord John Russell, "the Court of Appeal of the Privy Council extremely unsatisfactory; it is impossible that the public can be satisfied, so long as this Court is without judges who can constantly attend. According to the present arrangement, counsel are engaged, and all other expenses incurred; but the judge, having some engagement elsewhere, does not come to the

Court; and the parties are involved in all these expenses and loss of time, for no other reason than that no one is bound to attend. When I consider the immense importance of this Court, and the number of appeals to it against the decisions of inferior Courts, and that the sitting of the judge is a matter of mere chance and caprice, I certainly think such a state of things discreditable, if not disgraceful, to the empire.”*

This Act, it will be observed, is not only silent as to the times of the sitting of the Court, but it makes no provision for the appointment of any presiding judge. It is an essential element in the constitution of a Court composed of several judges, for the purpose of securing order and regularity in its proceedings, and the certainty of its sittings, that there should be a presiding judge. “It is in the highest degree important,” said the Lord Chancellor, “that some one person, whose habits and knowledge of the law fitted him for such an office, should be appointed to take the lead in the Privy Council. The present chief of that Court is not a lawyer, and it is necessary, not only that its chief should be a lawyer, but also that he should be the most eminent lawyer that could be procured; for, considering that that Court is the highest Court of Appeal for all Colonial business, nothing, in his opinion, ought

* Lord John Russell’s Speech, Mirror of Parliament, August 5, 1840.

to be spared which could add weight and authority to its decisions.”*

One obvious effect of that part of the measure which requires that the appeal should be heard, and the report or recommendation made in the presence of, at least, four of the members of the judicial committee is, that it obstructs rather than promotes the regularity of the Court’s sitting, because the convenience of four persons must be consulted.

Of the noble and learned persons named in the Act, Lord Brougham, the judge of the Prerogative Court of Canterbury, the judge of the High Court of Admiralty, and the chief judge of the Court in Bankruptcy, were in the habit of attending the hearing of appeals. It was found impossible to procure the uniform attendance of all those persons, and the assistance of two of the common law judges of the Court at Westminster was obtained by making them Privy Councillors, and appointing them members of the Committee.

To constitute a Court, resort must be had to the judges of the other Courts, and their attendance at the Privy Council must be given when it will least interfere with the duties they have to discharge as judges in their respective Courts. Now, of those judges, it was observed by the Lord Chancellor, “that most of them had so much business to attend

* Lord Cottenham’s Speech on the Appellate Jurisdiction, 13th June, 1836.

to in their own Courts, that it was scarcely possible for them to find time to attend to the new duties imposed upon them.”*

Although it is certain that the Appeal Court will not sit during the term, yet it is not certain whether it will sit, or what will be the days of the sitting in the interval between the terms, nor what will be the duration of its sittings. It has happened sometimes that parties have been summoned, and counsel attended, and after waiting an hour or more in the adjoining room, it has been announced to them that a Court could not be formed.

One of the effects of this uncertainty and irregularity, is the constant struggle by parties to have their cause taken out of its place in the list, and a portion of the day's sitting is consumed in hearing and disposing of the particular topics which each suitor urges for putting an end to the delay he has already suffered, and accelerating the hearing of his cause.

Again, it becomes impossible to hear causes according to the length of time, and the priority in which they have been ready for hearing, but there must be an arrangement made of them, in order to provide for one or more of the judges being precluded from deciding on the appeal. This occurs when either the judge of the Prerogative Court, or the judge of the High Court of Admiralty cannot sit, because it is an appeal from the Ecclesiastical

* Hansard's Debates, 13th June, 1836.

Court, or from the High Court of Admiralty. It occurs also, when it is supposed that the hearing of the cause cannot be concluded in one day, and one or more of the judges who may have heard part of the argument, cannot attend the succeeding day. In order to avoid the inconvenience of postponing the further hearing of the cause until the judges by whom it was heard in part can be assembled at its resumed hearing, the appeal loses its priority, and is postponed.

If this expedient be not adopted, or if contrary to the expectation of the Court, the hearing of a cause should not be concluded on the day it is opened, it sometimes happens that one of the judges is compelled by his other judicial duties, to be absent on the next day of sitting. This part heard cause cannot, therefore, be resumed, but another cause is interposed for hearing. The remaining judges pass from this cause into another, involving an entirely different system of jurisprudence. At the sittings of the Judicial Committee before Christmas last, a case from the Ecclesiastical Court was heard in part, its hearing, however, could not be concluded in consequence of the unvoidable absence of one of the judges, and in the meantime, a case from the Cape of Good Hope was heard, requiring an accurate knowledge, and a correct application of the principles of the Roman-Dutch law.

The primary object, and the primary duty of him, whose learning and practice have conducted

him to a judicial seat in a Court of Law, will be his attendance on that Court, and the discharge of his duties as one of its Judges. Imperceptibly, and in spite of himself, as often as he is called away to the Privy Council to sit as a judge, his attendance and his duty *there* will be felt by him to be objects secondary in respect of the obligations imposed on him, secondary too in respect of the interest they excite, and the alacrity and zeal with which he pursues them. He will imperceptibly feel, as we all do, the irksomeness of a duty which is regarded secondary in its claim on our attention, and that irksomeness will be the greater in finding himself for a time withdrawn from a jurisprudence with which he is familiar, to apply his attention to that which had formed no part of his professional education, and which can scarcely afford him any interest.

Under such disadvantages it must require a continued effort on the part of the judge to watch and suppress any lurking desire to accelerate the disposal of the case, and relieve himself from an irksome duty. He is too much exposed to the risk of imitating those judges described by the Chancellor D'Aguesseau, "*qui voyent croître les procès sous leurs yeux avec une attention inquiète, et qui se laissant emporter à l'ardeur dévorante de leur génie, se hâtent de cueillir et de présenter aux plaideurs les fruits encore amers d'une justice prématurée.*" Le Magistrat instruit de ses devoirs,

sait qu'il y a quelquefois plus d'inconvénient à précipiter la décision, qu' à la différer. *

There is cause to apprehend that there may be too great an inclination to presume the sentence appealed from to be right, and too great a desire to sustain it, instead of reviewing the case without any bias, and with the same consideration as if it had never been previously decided by any Court.

Surely the constitution of an Appellate Court is defective, when it exposes its members to the risk of treating their attendance, and the performance of their duties as secondary in importance, and makes the patient and deliberate hearing of the causes, the result of a struggle between the natural tendency of the circumstances in which they are placed, and the dictates of a deep sense of the responsibility which they have incurred.

It is another great objection to the manner in which this Court is constituted, that the same judges are not always present, that with respect to the individual by whom the appeals are heard and decided, it is a fluctuating Court, and there is always uncertainty who will sit in judgment. The decisions of such a tribunal will not carry the weight and authority with which the sentences of a Court of ultimate appeal ought to be regarded. There will sometimes be wanting uniformity in its decisions, or there will be nicely drawn and subtle

* Ouvres D'Aguesseau, Tome 1, p. 182, XIV. Mercuriale.

distinctions, in order to avoid a direct and palpable deviation from a former judgment. Either of these results is an evil in any Court, but more especially in that which is of the dernier resort, whose duty consists not merely in the correction of what is erroneous in the individual case, but in making its decisions supply the subordinate Court with principles and rules by which the latter may be guided in applying them to similar cases. It has been well observed by a lawyer of the greatest experience, that "no Court of Appeal can act to the satisfaction of reasonable men, unless it is composed, as long as circumstances will permit, of the same persons, whose express duty it is to hear the appeals, and who are responsible for the decisions, nor unless they are presided over by an accomplished lawyer, to whom the profession and the suitors may look up with confidence." *

Another evil necessarily caused by the present constitution of this Court, and the frequent interruption and the great uncertainty of its sittings, is, that it cannot command its own separate Bar. This is an evil of immediate and extensive influence on the character and efficiency of a tribunal whose duty it is to be fully acquainted with, and accurately to apply various systems of foreign jurisprudence. An advocate of the greatest eminence in the Court in which he is accustomed to practice, and whose studies have been exclusively directed

* Sir Edwd. Sugden's letter to Lord Melbourne on the Appellate Jurisdiction, 1835.

to that branch of jurisprudence which it administers, will consider his occasional attendance at the Appellate Court subordinate and secondary to his constant attendance in his own Court. His professional education having been directed exclusively to the law of England, his attention to either of those systems of foreign jurisprudence must commence with the occasion which requires him to understand and apply it, and when upon his accurate knowledge and correct application of it, the interests of his client must entirely depend. Fully occupied with the business of his own Court, and not knowing at what time his attendance at the Appellate Court will be required, it would be a fruitless sacrifice of time which he could ill spare, if he prepared himself before the hearing of the cause was fixed. Six months may elapse before the day for hearing is appointed, or its hearing may take place in less than four days.

The greatest talents, the most intimate knowledge of the jurisprudence of England, the most consummate forensic experience and skill will not compensate for the want of that familiar acquaintance with the foreign jurisprudence which may be essential to enable the advocates to render to the Court and to his client, all the assistance which is required of him.

These are some of the considerations on which it is submitted, a Court of ultimate appeal, and more especially that which decided appeals from

our Colonies and dependencies is not properly constituted, when it is principally, and sometimes indeed entirely composed of judges taken from their duties in other Courts, and where its sittings are holden as often, not as the claims of suitors require, but as is compatible with the discharge by the judges of their duties in their own Courts.

But if the Appellate Court were principally composed of those who were not judges in any other Courts, and who could therefore devote their exclusive attention to the discharge of the duties of the Appellate Court, its sittings would be frequent and regular, the attention of the judges would be directed to the acquisition of an intimate acquaintance with those systems of foreign jurisprudence which they were required to administer. It would command a separate Bar, and thus furnish a body of men well versed in that jurisprudence. The decisions of the Court would be uniform and consistent, would carry with them the highest authority, and be satisfactory to the suitors and the public.

The principle of giving to the Court of ultimate appeal its own separate judges, unconnected with and not required to discharge the duties of any Court of original jurisdiction, was at a very early period adopted in the judicial institutions of the other states of Europe. The weight and character which it has been seen their Appellate Courts enjoyed, abundantly establish the advantages which

are to be derived from it. That uniformity in the application of the law which it is the first duty of an Appellate Court to secure, is more likely to be obtained where the mind of the judge is not pre-occupied and his judgment is not biassed by any decision he may have made as a member of a Court of original jurisdiction.

The necessity of placing the appellate jurisdiction of the Privy Council on a better footing has at length been generally admitted. In the last Session of Parliament, a Bill passed the House of Lords for the appointment of two equity judges. This measure, which had been very long and urgently required came to the House of Commons with every recommendation it could derive from the profound learning and experience of the noble and learned persons by whom it had been matured, and from the satisfaction with which it had been received by the profession and the public. An eminent lawyer of the highest authority in the House of Commons, rested his opposition to the measure on the ground that it was not accompanied by any measure for the improvement of the appellate jurisdiction.

This Bill, as originally introduced by the Lord Chancellor contained a provision for securing the constant attendance of the Master of the Rolls, and constituted him the President of the Judicial Committee. This provision however, did not carry with it the concurrence of the profession or the public.

It would necessarily cause a serious interruption to the business of the Rolls' Court. The Court would, it is true, have obtained the assistance of a most eminent Judge, whose personal qualities secured him the confidence and respect of the profession, and whose single act of consenting to undertake this additional duty evinced that devotedness to the public service, and that scrupulous and unceasing anxiety for the efficient administration of justice by which his whole professional and judicial career has been distinguished. But the defect in the constitution of this Court would not have been obviated. It would still have been composed of members who continued Judges of Courts of original jurisdiction. It would not have possessed the great advantages to be derived from such a constitution as would give to the Court its own Judges and its own separate Bar.

The practice which had for many years prevailed of leaving the whole judicial duty of this Appellate Court to be discharged by the Master of the Rolls, could scarcely afford a sanction for this measure. At that time the Master of the Rolls did not sit in his Court during the morning. The business of the Appellate Court was so inconsiderable, and the subjects it presented so exclusively those of Equity, or of the Common or Statute Law of England, as scarcely to admit of a comparison with its present extent and variety of systems of jurisprudence.

Besides, this measure would have still retained

that most singular anomaly peculiar to the judicial institutions of England, the existence of *two* Supreme Courts of ultimate appeal. Such an anomaly entirely defeats the great object of an ultimate Appellate Tribunal—uniformity in the application of the law. In this double establishment, each being equally supreme, and therefore each possessing equal judicial authority, neither is bound by the decision of the other. The possibility of conflict between them, and of the existence of two opposite rules of law judicially declared by them is incident to such an establishment. But although each possesses equal judicial authority, yet it is obvious that the one will acquire greater moral authority and command greater respect than the other. The Supreme Appellate Court of the Queen in Council has occupied a much lower place in the estimation of the public as a Supreme Appellate Court than the House of Lords.

It is impossible not to be struck with the confirmation which this observation has received from a recent occurrence at that Court. A sufficient number of its members having been convened to decide a very important testamentary cause, a day was appointed for its hearing. For several days preceding some of the leading newspapers of the day inserted letters and paragraphs containing allusions to the supposed fact, that one of the Lords who it was expected would constitute one of the Court, had been the counsel of one of the parties in the Court below. The day arrived, and about twenty

counsel appeared for different parties interested under the testamentary dispositions in question. The leading counsel of one of those parties objected to the learned Lord forming part of the Court by whom the cause should be heard, and intimated his intention of withdrawing, if the learned Lord should sit. I know not for the dignity of the Court whether most to regret that such a recusation should have been made, or that the Judge should have sanctioned it by withdrawing from the Court.

There ought, therefore, to be only one supreme Court of Appeal, in which should be heard and decided all the appeals at present preferred to the Queen in Council and to the House of Lords.

Appeals from the Court of Session constitute by far the most considerable part of the appellate business of the House of Lords. For the discussion and decision of those appeals, there is required experience in a system of jurisprudence which forms no part of an English lawyer's education. It may happen, that the Chancellor, enjoying the highest reputation, and possessing, in the most unlimited degree, the confidence of the profession and the public, may never have bestowed previously to his acceptance of the Seals any attention on Scotch jurisprudence. An Advocate of the highest eminence at the English Bar, selected as counsel in a Scotch appeal, almost invariably commences his study of Scotch law with the first case intrusted to him.

On the presumption that it is necessary the

Court by whom the appeal is to be decided, and the Counsel, by whom it is to be argued, should be informed of the branch of law involved in it, the Advocate in Scotland prepares the appeal case with a degree of minuteness, which renders it almost a treatise on that branch of law. There is thus an item of heavy expenditure in a Scotch Appeal, which would be avoided, if the Court and the Counsel had the same acquaintance with the law of Scotland as they have with the law of England.

A great part of the jurisprudence of Scotland is, it will be recollected, founded very much on the Civil Law. This Law is the basis on which the systems of the Dutch, Spanish, and French Law has been raised. Independently of every other consideration which recommends the formation of a single Court of ultimate appeal, the learning and experience in those systems of foreign law which were required for the decision of appeals from many of our Colonies would necessarily render the Court better qualified to deal with appeals from Scotland.

In what manner then, and of what persons ought such single Court of ultimate appeal to be constituted?

The discussions on the Appellate jurisdiction have for the most part only insisted on the great principles which should govern the constitution of the two Appellate Courts of the Queen in Council, and the House of Lords, and have assumed that both should be retained.

Sir Edward Sugden, in his Speech, in December 1830, and in his letter to Lord Melbourne, in 1835, addressed himself principally to the Appellate jurisdiction of the House of Lords, and more especially with reference to the decision of Appeals from the Courts of England and Ireland. "The Appellate jurisdiction," he says, "should be put on a different footing. The appeal should not be from the Judge to the same Judge. An effective Court of Appeal is a necessity—it can no longer be dispensed with. The Lord Chancellor should have, regularly, other and great assistance in the House, in hearing appeals." "With respect to the Privy Council," he says, "such a Court should be presided over by an accomplished lawyer, to whom the profession and the suitors might look up with confidence. He ought to have the ablest assistance the judicial Bench can furnish him. He ought not to hold his office during Her Majesty's pleasure."

Lord Lyndhurst proposed, "that, instead of the Lord Chancellor, an additional Equity Judge should preside over the Privy Council. The jurisdiction of the Privy Council took cognizance of the administration of the laws of Spain, France, Holland, and other countries. The new Judge should be conversant with the principles of law in reference to all those countries. He should at the same time hold the sittings of the Court at certain stated periods."

The Lord Chancellor says, "It is in the highest

degree important that some one person, whose habits, and knowledge of the law fitted him for such an office, should be appointed to take the lead in the Privy Council. It was, therefore, obvious, under this manner of looking at the question, that the only course left for their Lordships to adopt was, to make the Lord Chancellor, for the time being, the President of the Court of Appeal, both in that House, and in the Judicial Committee of the Privy Council."

"The Judges of the Privy Council," says Lord Brougham, "should be men of the largest, legal, and general information, accustomed to study other systems of law, besides our own, and associated with lawyers who have practised or presided in the Colonial Courts. They should be assisted by a Bar limiting its practice, for the most part, to this Appeal Court; at any rate making it their principal object."*

"In order," said Lord Langdale, † "that this House, as the highest and last Court of Appeal, may be able adequately and satisfactorily to perform the great and important functions with which it is invested, I submit to your Lordships, that the most eminent lawyer who can be found, eminent for learning, for integrity, and for judicial character, should permanently preside over it in all business of

* Mr Brougham's Speech on the state of the Law, Feb. 1828.

† Substance of Lord Langdale's Speech, June, 1836, p. 45-6.

appeals or writs of error ; that he should hold his office during his good behaviour, and be thereby wholly exempt from political excitement, or the effect of political changes.

“ And recollecting that the cases which come here are cases of Equity, cases of Common Law, and cases of Scotch Law, and that in these days you scarcely find any lawyer who is particularly conversant with more than one of these different systems of law, I submit to your Lordships that the learned Judge, whom, for the sake of discussion, I propose to call “ Lord President of this House, in matter of Appeal and Writs of Error,” should have assistants, to be selected from amongst the persons most eminent in the different branches of the law administered here. What I submit is, that the assistance should be regular and constant ; that the learned persons who afford it should not necessarily be Peers, but should be called “ Lords Assistant of the House of Lords, in the matter of Appeals and Writs of Error,” and should be seen and known by the public to be steadily engaged in that important service ; and for that purpose should hold their offices during their good behaviour ; that they should always be found here, and always be called upon openly to give their advice to the House before the judgment is pronounced.”

His Lordship, in a subsequent part of his speech, urges the advantage of transferring the present business of the Judicial Committee to such an Ap-

pellate Court in the House of Lords as he recommended :

“ The House of Lords,” his Lordship adds, “ provided with effective assistance and sufficient machinery, might, if you should think fit, have transferred to it the whole, or at least part, of the Appellate business of the Judicial Committee of the Privy Council. There would, I think, be great convenience in transferring the whole.”*

Lord Langdale’s plan received the approbation of the Lord Chancellor.

“ Of the two plans,” said his Lordship, “ proposed to the House, instead of that contained in this Bill, he preferred the expedient suggested by the noble and learned Lord (Lord Langdale), and ultimately that might turn out to be the best course to pursue. But as the noble and learned Lord was not prepared with his plan, and as this measure, if passed, would not prevent its future adoption, their Lordships had better take this which he proposed, as an intermediate step.”†

Mr. Lynch, in his excellent letter addressed to Lord Melbourne, in 1836, recommended the establishment of one Appellate Court, and suggested the number of Judges of whom it should be constituted.

* Lord Langdale’s Speech, p. 53.

† Lord Chancellor’s Speech, p. 485.

It is a principle recommended by the plans of his Lordship, the Master of the Rolls and Mr. Lynch, and if it is not expressly recognised, at least it is not rejected by any of the eminent persons who have applied themselves to the consideration of this subject, that the Supreme Court of ultimate appeal should consist of more than one Judge, and that in its constitution it should have the same security for the independence of its members which is possessed by the subordinate Courts of original jurisdiction, and that, therefore, like the Judges of these Courts they should hold their offices during good behaviour. It would indeed be a strange proposition, that a quality so essential to the constitution of a subordinate Court, was unnecessary in that of the Supreme Court of ultimate appeal.

Another principle recognised by all the high authorities to whom reference has been made, and which no person would be found in terms to reject, although their plans might not carry out and give effect to that principle, is, that a knowledge of the jurisprudence required to be administered should be as essential to the constitution of the Supreme Court of Appeal, as it is to that of the subordinate Courts. Mr. Lynch has suggested some details for carrying out this latter principle. He proposes that the Court should consist of the Chancellor, and three other members, and that the Chancellor, whose office was to be for life, should be President,

—that of these four members two should be Equity lawyers, one a common lawyer, and the other a civil lawyer.

It is, as it certainly ought to be, part of the plan proposed by the Master of the Rolls and Mr. Lynch, that the President of the Court of Appeals should not be a judge of original jurisdiction in another Court, and therefore Mr. Lynch, although he proposes to constitute the Lord Chancellor the President of the Appellate Court, withdraws from him all the duties of a Chief Justice in Equity.

The effect of both these plans is wisely to give to the judges of the Supreme Appellate Court the same protection which is given to those of the subordinate Courts of original jurisdiction—protection against themselves—against the infirmities of our common nature, by removing from them the dangerous temptations to which they would be exposed from political conflict, and especially when in that political conflict was involved the duration of their offices. Hence the President of the Appellate Court would no longer be a political minister.

The soundness, nay the indispensable necessity of adopting the principle, that those by whom the judicial power is exercised, should be wholly independent of the executive, and that the judge should not be exposed to the influence of political bias is universally admitted. It has, however, been urged with great force, that the departure from this principle, in the case of the

Chancellor, is required by the exigencies of the Executive Government—that it is essential the Cabinet should have the assistance of the head of the law, and that to secure his cordial assistance, he must be identified in interest with that Cabinet; in short, that he must owe his office, and his continuance in it to the ministry by whom he was appointed Chancellor. But it is submitted that every consideration which suggests this objection to the separation of the political from the judicial duties of the Chancellor, is fully met by the measure proposed by the Master of the Rolls. If, as recommended by his Lordship, the custody and use of the Great Seal were taken from the Chancellor, his judicial functions confined to the Court of Chancery, as its chief judge, and a Lord Keeper of the Great Seal appointed, the latter might be invested with all the political functions, and with all the patronage and power at present exercised by the Lord Chancellor. He might also give to the Cabinet, of which he was a member, all the assistance which is derived from the legal eminence of a Lord Chancellor. In fact he would, to all intents and purposes be to the Cabinet, what the Lord Chancellor is, with this further advantage, that his co-operation as a political minister, would suffer no interruption from the discharge of his judicial duties. “He would still be,” says Lord Langdale, “the King’s principal adviser in matters of law, a Privy Councillor, a Cabinet Minister, and a great officer of state, responsible in all mat-

ters, ministerial and political, which are connected with the custody and use of the Great Seal. He would still be the head of the law, the connecting medium between the state and the profession ; he as Lord Keeper, would have the nomination of magistrates ; and, as I submit to your Lordships, should be responsible for the appointment of all judges and judicial officers. It would, my Lords, be the duty of the Lord Keeper to conduct and direct inquiries into the state of the law, for the purposes on account of which commissions have lately been appointed—to prepare and bring forward all bills introduced with the sanction and approbation of Government—to examine and report upon all bills brought into Parliament by individual Members of either House—to superintend the general orders from time to time made by Courts of justice for the regulation of practice and pleading ; for the alteration of fees, and the regulation of salaries and emoluments in Courts of justice, and it might be made his duty to make annual reports and give information in respect of all such matters to the King's government and to Parliament.”*

The only security for discreet and beneficial alterations in the law is when they are effected under the superintendence of a single individual possessed of adequate knowledge and learning, and under high official responsibility. Improvements in legisla-

* Lord Langdale's Speech, June 1836.

tion are rarely, if ever effected, when they are undertaken by several persons, or when those persons are irresponsible.

The numerous duties which, according to Lord Langdale, would be assigned to the Lord Keeper are such as necessarily to secure the appointment of the most eminent lawyer, and the same motives which would insure the appointment of the most eminent lawyer to fill the office of Chancellor would influence a minister in the appointment of a Lord Keeper.

According to Mr. Lynch's plan, the Appellate Court would have the assistance of only one civil lawyer.

It is doubted whether that assistance is adequate to the necessity. By far the most considerable part of the business of the Court would consist of appeals from Scotland, and from those colonial possessions where systems of foreign law prevail. In deciding appeals from the Courts of Equity, and writs of error from the Courts of Law, the Appellate Tribunal might have, whenever it was deemed necessary, the assistance of all or any of the judges of those Courts in the same manner as that of the judges is at present obtained in the House of Lords.

Again, it will be recollected that appeals and writs of error from the Courts in England and Ireland have been before they arrived at the Court of ultimate appeal, examined and reviewed by one or more Appellate jurisdictions. The decisions

of the judges in Equity would have been brought by appeal before the Chief Judge in Equity, and those of the Courts of Law would have been also examined in those stages of appeal which at present exist.

It seems too objectionable that the Court should rely on a single judge for the assistance it requires in the decision of questions exclusively of Scotch and foreign law.

It may be further observed, that if the selection of a "civil" lawyer is suggested with the view of obtaining the learning required for the decision of Ecclesiastical and Admiralty Appeals, it would not necessarily supply that which was required for the decision of appeals involving those systems of foreign jurisprudence which have been just mentioned. The present Judge of the Admiralty was, when at the Bar, most extensively engaged as counsel in appeals from Scotland and the Colonies. But a succeeding judge of the Admiralty might not, from the nature of his previous practice in Doctors' Commons, possess any acquaintance with those systems of jurisprudence. It is submitted therefore, that two of the members of the Court of ultimate appeal should be selected, on account of their extensive acquaintance with other systems of jurisprudence besides our own, as is recommended by Lord Brougham. The Appellate Court, if two of the judges were Equity lawyers, would consist of five members, whose judicial duties were confined to that Court. The Judge of the

High Court of Admiralty, and the Judge of the Prerogative Court might also continue to be members of this Court, and thus in the decision of appeals from their respective Courts, and from the Vice Admiralty Courts in the colonies, there would always be rendered the assistance of one judge eminently qualified in those branches of law. Whatever may be the number of its members, the presiding judge should be a Peer. There should be a Registrar and Assistant Registrar, to perform the necessary ministerial duties of the Court, and the former ought to be a Barrister of a certain standing at the Bar.

Whatever improvements may be made in the constitution of the Appellate Court, they will, it is conceived, fail in accomplishing their object, unless the Court has its own separate Bar.

The arrangement of the business, and the construction of the place in which the Court sits, and in short, whatever can be effected by the Court, should be directed to the acquisition of a separate Bar.

The establishment of a separate Bar will greatly depend on the authority, not only of the Appellate Court itself, but on that of the other Courts of original jurisdiction. By resisting, and by taking care to prevent arrangements which might enable a Counsel to leave the Court in which he usually practises, in order that he may take a part in the hearing of a cause in some other Court, there will soon be an end to a practice which frequently leads

to the interruption and delay of the business of the Court. Unless this be effected, even the additional power proposed to be given to the Courts of Equity, by the appointment of two additional, will fail in affording the full benefit which was intended to be secured. At the very period that the accumulation of business was the subject of the clearest proof before a Committee of the House of Lords, the Vice-Chancellor's Court rose at ten o'clock, in consequence of the absence of counsel in the House of Lords.

Sir Edward Sugden, in his speech on the 16th of December, 1830, was so impressed with the necessity of a separation among, as well the men behind the bar, as those within the bar, that some of the important measures he suggested were directed to insure that separation. There would be less of the time of the Court unnecessarily consumed, and it is believed too, that in the argument of the case, no inconsiderable advantage might be derived from it.

The establishment of a separate Bar is indispensable to the efficiency of such an Appellate Court. Because, if there be not a separate Bar, the jurisprudence which is required in that Court will never be the object of study, or even of primary attention.

It is a great evil when the attainments of the advocate are not equal to those of the judge whom he addresses. The latter does not derive that assistance which so much contributes to the careful and complete examination of all the bearings of a

question. It is second only to the evil of the attainments of the judge being so much below those of the advocate, as to make the former depend on the latter.

By the establishment of such a separate Bar in the Appellate Court, a most beneficial change would be effected in the education and acquirements of the advocates of England.

There is no motive to induce them to unite the study of English jurisprudence with that of the civil law, or of any code of Europe. The advocate, on his first acquaintance with the principles and practice of our Courts of Equity, finds that the Court will not entertain discussions on, and that he need not, therefore, inform himself of any foreign law which may be involved in the case, but that it is left to the Master to ascertain what that law is, and the Court adopts that, which on inquiry, he reports to be the law.

Eminent as the Bar of England are for the most profound knowledge of English jurisprudence, yet their ignorance of the civil law, and of the general jurisprudence of Europe, has been long a subject of surprise.*

The science of English jurisprudence would derive no inconsiderable benefit, if in its pursuit, there had been some reference to and acquaintance with

* Duck, de Usu Juris Civilis, p. 351. Dr. Strahan's Preface to his Translation of Domat, XI. Story's Pref. to Conflict of Laws, p. vi.

other codes. At all events, in the present intercourse which happily subsists between this country and the other parts of the world, there are various considerations which give to the public an interest in finding amongst the Bar of England an adequate number of its members well versed in the systems of jurisprudence which prevail in Europe.

Unless there is a separate Bar, the Appellate Court will have no other attendance but that of the Counsel who are engaged in the cause. It has been justly observed, that the publicity of the hearing of a cause, "*est le remède le plus naturel et en même temps le plus efficace, pour assurer la subordination de l'ordre judiciaire à la loi et à toutes les dispositions qu'elle contient.*"* It is too, one of Lord Bacon's Aphorisms "*Nec decreta exeant cum silentio, sed iudices sententiæ suæ rationes adducant, idque palam et adstante coronâ, ut quod ipsâ potestate sit liberum, famâ tamen et existimatione sit circumscriptum.*"†

The presence of an intelligent and learned Bar is still better calculated to secure this object. They are, it has been well said, "*comme le surveillant naturel des tribunaux, comme suppléant à leur défaut.*"‡

The places in which the House of Lords and the judicial Committee at present sit, do not afford

* Meyer, Esprit, &c., Des Institutions Judiciaires, tom. 5, p. 123.

† Lord Bacon's De Augm. Scient. lib. 8, c. 3, Aphor. 38.

‡ Meyer, ib. p. 543.

the means of accommodating more than two or three counsel, besides those engaged in the cause. Indeed the latter Court is so constructed as to render it almost impossible for an audience standing behind the bar, to hear a syllable which is said by Counsel.

The place of holding the Appellate Court, whether it be in, or adjoining the House of Lords, or the Council Office, provided it be adapted for the accommodation of the Bar, and the public, cannot be material.

The petitions to Her Majesty in Council, on which the appeals from the Colonies are founded, might continue to be referred to this Court, whether it sat in the House of Lords, or in any other place, and the petitions on which appeals to the House of Lords proceed, might also be referred by that House to the same Court.

The establishment of one Supreme Court of Appeal has encountered two objections.—The one treats any alteration in the present mode of exercising the Appellate jurisdiction of the House of Lords, as interfering with the requisite authority of that House, and impairing its constitutional weight.

There is no man by whom the constitutional authority of this branch of the Legislature is regarded with greater reverence than by the writer of these observations. He believes the liberty of the subject is inseparably connected with, and absolutely dependant on, the preservation of the House of Lords, in that state, which shall enable it

to act with perfect freedom and independence. He believes, too, that it possesses a strong hold on the confidence and affection of the people of this country. But let the manner in which the Appellate jurisdiction of that House is at present exercised be compared with that in which it would be exercised, if the proposed Court were established, and then can it be gravely urged that the dignity, or the weight of this branch of the Legislature could in the slightest degree be impaired, or the people's confidence and affection in the slightest degree diminished? At present the appeal is referred to a Committee. It is heard in the presence of the Lord Chancellor and three Peers. *Nominally*, those Peers are Judges. They are corporeally present, but in fact they take no part in the proceeding. The case is decided by the Lord Chancellor, and the House adopts his decision. What would be the course under the proposed alteration? The appeal would be referred by the House of Lords to a Court where a learned law Lord presided, and where the assistance rendered by the Judges associated with him, would be real, and not nominal, and the Report of that Court would be adopted by the House of Lords.

Can the dignity or constitutional authority of the House of Lords depend on the place where the appellate jurisdiction is exercised? Can it depend on the three Peers or any number of Peers appearing in the House during the hearing, and thus

exhibiting the real mode in which that jurisdiction is exercised? On the contrary, does not the House of Lords rest its title to the respect and veneration and attachment of the people, on its substantial and beneficial exercise of its independent powers of legislation. Has not the present age advanced too far in sense and reflection to attach importance to a privilege which in its actual exercise is so unsubstantial? Can such a shadow impose on them? Does not the exhibition of the striking contrast between the present exercise of this jurisdiction and the legal qualifications which originally constituted the title in the House of Lords to the jurisdiction, rather tend to impair the authority of the House? If, however, these considerations do not remove the objection, let the Appellate Court sit in the House, and let three Lords, as at present, attend if they think proper.

It has been further urged, that if the judges were exclusively confined to the Appellate Court, and were not to be occupied occasionally as judges of original jurisdiction, they would cease to be sufficiently conversant with the law; in short, that the exclusive exercise of appellate jurisdiction would deprive the judge of his acuteness, and of the power of retaining and applying his learning. There can be no question that the whole Appellate business of this great Empire is abundantly sufficient to engage the attention of the Court during the whole period of the year in which other Courts

are accustomed to sit. There is no danger that such effects could be produced from the want of adequate employment. The appellate business of the House of Lords and of the Judicial Committee is abundantly sufficient to engage the attention and occupation of one Appellate Court.

There is no greater mistake where the constitution of a Court is such as not to promote, but rather to obstruct the prompt administration of justice, and involve the parties in great expense, than to consider the quantity of business which is *actually* brought before it, a just criterion for estimating that which *would be* brought before it if no such delay existed, and no such expense was inevitably incurred.

The evil of a Court defectively constituted consists not merely in the delay and expense to which the party who has instituted his suit is subjected before it is decided, but in its inevitable tendency to discourage or preclude the subject from resorting to such a Court.

In looking at the returns of the arrears of causes in the Privy Council, it ought never to be forgotten that they always afford a very inadequate representation of the extent of the delay, and of the actual evil which the subject sustains from the present state of that Court. Many appeals from the Colonial Courts are not to be found in the Colonial Office, until long after they have been prayed. The parties consent to regard the appeals as pending, until

there is a better prospect of bringing them to a hearing. Again, appeals are not prayed, or if prayed, are afterwards abandoned, from the reluctance of the parties to subject themselves to the vexation of the delay, or to involve themselves in the heavy expense which is the necessary consequence of the infrequency and irregularity of the sittings of the Court.

To the observation that the previous attainments and qualifications of the judge may be greatly impaired by the practice of hearing only appeals, the Lord Chancellor gave this conclusive answer, which his experience furnished: "Since the year 1813, the Lord Chancellor, had, in fact, been nothing more nor less than a judge of appeals, and a judge of appeals only, and yet he thought no man would contend, that, within that period, the office of Chancellor had not been filled by men of sufficient eminence."*

But this theory is contradicted by the experience, past and present, of the Supreme Appellate Judicatures of all Europe. It has been considered by those who have devoted their attention to the constitution of such Courts, that there was a greater probability of a strict, undeviating, uniform application of the law, when the judges were free from any prepossessions which they might imbibe as subordinate judges, and from any opinions which

* Lord Cottenham's Speech, 13th June, 1836.

owed a greater weight to their currency than to the grave deliberation which had been bestowed in forming them.

The expense of establishing one Supreme ultimate Court of Appeal, consisting of five judges, and of the requisite ministerial officers, needs no discussion. Mr. Lynch has stated that which would be incurred, if the establishment consisted of four judges. It might be easily shewn how inconsiderable the expense would become by means of the saving of the salary of the judges of the Court of Review in Bankruptcy, and of the Chancellorship of the Duchy of Lancaster, in the abolition of these offices. But, in truth, the requisite expense incurred in providing adequate means for promoting the efficiency of an Appellate Court, and thus enabling the subject to obtain justice with the least delay, and the least expense, affords the means of its own reimbursement. The suitor feels himself enriched by it. But even if it were otherwise, it is the paramount duty of every state to sustain that expense, if it be necessary to secure to the subject the prompt and efficient dispensation of justice.

In submitting the necessity of improving the Supreme Appellate Tribunal to which the appeals from the Colonies are now referred, it is impossible to overlook some glaring defects in the law regulating appeals in the Colonies.

First, the amount of the sum in dispute, to au-

thorise the Colonial Court to grant the appeal, must exceed 500*l.* sterling. This sum was always too high. In the alteration which has recently been effected in the state of Colonial society by the abolition of slavery, the right of appeal would not be enjoyed by a large proportion of her Majesty's subjects, for their litigation may not for a considerable time involve such an amount. It is difficult to understand any principle on which such a restraint on the right of appeal could ever have been justified. The Courts of the Colonies were not originally composed of lawyers. At a later period the Chief Justice was a lawyer. In the greater number of the Colonies, the salaries of the judges were too inconsiderable to induce men of competent professional education to accept the office of judge. It might have been supposed that these defects in the constitution of the Colonial Courts, and the greater probability of erroneous decisions, would have afforded a strong reason for facilitating appeals to that tribunal by which those decisions might be corrected. It is singular, too, that in those Colonies which have Courts of Equity, an appeal from the Chancellor of the Colony to the Queen in Council is permitted without any limitation whatever.

In Guernsey, an appeal to the Queen in Council is permitted, although the sum in litigation, if real property, is only 10*l.* sterling per annum, or if personal property 200*l.* In Jersey, it is permitted when the amount exceeds 300 *livres tournois*.

It is submitted, that in all cases where the sum exceeds 300*l.* sterling, the appeal should lie directly to the Queen in Council, and that where it did not exceed 100*l.* sterling no appeal should lie but by leave first obtained from the Supreme Appellate Court.

Appeals from the Courts of Chancery in all the Colonies should be subject to the rule which was established by the King's Instruction in 1763, *viz.* that an appeal should suspend all proceedings in the suit, except the appointment of a Receiver, and the granting of injunctions. The want of such a Rule in the Island of St. Vincent subjected the parties in *Sayers v. Whitfield*,* to the expense of twelve appeals upon orders, and proceedings consequent upon that order, which was the subject of the first appeal having been prosecuted notwithstanding the appeal.

In the several Colonies which were acquired before and at the peace of 1763, Courts of Error were established. The suitor in the Courts of Common Law could not obtain the redress of an erroneous judgment until it had first passed this Appellate Court in the Colonies, and the sum in litigation must have exceeded 300*l.* These Courts of Error were not composed of Lawyers, and the consequence of this system was, that the party appealed to a Court less competent than that

* 1 Knapp's Rep. 133.

which had pronounced the judgment, the subject of the appeal. This mockery was attended with great expense, and might lead to great injury, because the Court of Error might reverse a judgment which ought to have been affirmed, and the party aggrieved could not carry it by appeal before the Queen in Council, if the sum did not exceed 500*l.* sterling.

These Courts of Error never were, and never could be the objects of confidence to the Colonists. They were a practical evil, because they subjected the Appellant to the unnecessary expense and delay of the intermediate proceeding. It is known that in some of the Colonies, a writ of error has been brought solely for the purpose of delaying the execution of the judgment, inasmuch as no Court of Error could be holden.

In reviewing the judicial systems of the ceded Spanish and French Colonies, her Majesty's Government wisely abolished all their Courts of Appeal, namely, "The Superior Tribunal of Appeal of Civil Jurisdiction," and "The Tribunal of the Royal Audiencia" in Trinidad, and The Court of Appeal in St. Lucia, and the parties were enabled to appeal directly to the Queen in Council.

It is submitted that the Courts of Error in the Colonies should be abolished. It is believed such a measure would obtain the universal concurrence of all the Colonies.

It is a subject well deserving of consideration,

whether some provision might not be made respecting the East Indian appeals, which would relieve the Supreme Appellate tribunal from the insurmountable difficulty which it has to encounter when its decision involves the correctness of any conclusions of fact which have been drawn by the Courts in India. That difficulty is occasioned by ignorance of the habits, manners, opinions, and usages of the different castes there, which must necessarily exercise a great influence in forming a correct estimate of the degree of credit to which the testimony of witnesses is entitled. It would seem expedient that the Appellate Court should be only called on to apply the law to the facts as they were established in the Court below, and that some intermediate Court of Appeal should be established in India for the purpose of reviewing decisions, the correctness of which in any degree depended on conclusions of fact.

THE END.